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In the Supreme Court of the United States

OCTOBER TERM 1945.

No. 1215...

MAX D. GUSTIN,
Administrator of the Estate of
WILLIAM DUNCAN GRAHAM,
deceased,
Petitioner,

vs.

SUN LIFE ASSURANCE COMPANY OF CANADA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Circuit Court of Appeals
For the Sixth Circuit
and
BRIEF FOR PETITIONER.

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SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition for certiorari presents an important ramification of the doctrine of *Erie Railroad Co. v. Tompkins*, 304 U. S. 78, 82 L. Ed. 1194, 58 S. Ct. 817, and *West v. American Telephone & Telegraph Co.*, 311 U. S. 223, 85 L. Ed. 139, 61 S. Ct. 179. These cases, of course, hold that a Federal Court must follow the state law even though that state law consists only of a decision of an intermediate appellate court. In the present case the Circuit Court of Appeals relied upon a decision of an intermediate appellate court of the State of Ohio. However, this decision was not officially reported, and under a specific Ohio statute, Section 1483, General Code, it cannot be given recognition in any court.

The facts of the original cause of action, relatively unimportant to the present issues of this petition, will be summarized briefly.

Suit was brought by the petitioner upon a life insurance policy issued by the respondent. (R. 2.) The policy provided that loans made by the insurer to the insured against the cash surrender value of the policy should bear interest at "six per cent per annum." (R. 15.) The insurance also was extended, after default in premium payment, for a period of time determined by the cash surrender value less the outstanding loans against the policy, and the accrued interest upon those loans. (R. 15.)

The crucial issue in the trial court was whether the interest to be charged upon the loans against the policy was simple interest or compound. If the interest on the loans was to be compounded annually, then the extended period of insurance was not long enough to cover the death of the insured. If, however, the interest was to be simple interest, not compounded annually, then the insurance was in force at the death of the insured. The loan agreements, signed by the insured at the time of each loan, provided for compound interest (R. 99, 101, 103, 105, 107, 109, 111, 113), but were contested for want of consideration, since by the terms of the policy itself, the insured had a right to the advances. (R. 15.)

Upon these facts summary judgment was rendered for the defendant below and denied to the plaintiff. (R. 121.) The District Court held that the defendant insurance company was entitled to be credited with compound interest. (R. 115.) The Circuit Court of Appeals affirmed the judgment. (R. 129.)

The Circuit Court of Appeals, in its opinion (R. 137, 152 Fed. 2d 447), stated that, generally, the law of Ohio and the reasonable construction of the policy warranted reversal. However, the Court felt itself bound by the only case it found to the contrary. This case was *Johnson v. Pennsylvania Mutual Life Ins. Co.*, Cause No. 17113 in the Court of Appeals of Cuyahoga County, Ohio. (The Court of Appeals of Ohio is an intermediate appellate court between

the Ohio courts of original jurisdiction and the state Supreme Court.)

The *Johnson* case, however, was not officially reported, and according to Section 1483, Ohio General Code, it could not be given recognition or official sanction of any court within the state. Reliance upon the *Johnson* case by the Circuit Court of Appeals was therefore erroneous.

JURISDICTIONAL STATEMENT.

The judgment complained of was rendered by the Circuit Court of Appeals on the 13th day of December, 1945. (R. 129.) A motion for leave to file a petition for rehearing out of rule was filed on January 30, 1946. (R. 140.) A petition for rehearing was filed the same day. (R. 142.) On March 4, 1946, this Court, acting through Hon. Stanley Reed, extended the time for filing a petition for certiorari in this Court until May 10, 1946. On March 25, 1946, the Circuit Court of Appeals for the Sixth Circuit granted a motion for leave to file petition for rehearing but denied the petition for rehearing. (R. 144.)

The jurisdiction of this Court to review this decision is asserted under Section 240 Judicial Code; Title 28, Section 347 U. S. Code Ann. It is believed that the jurisdictional right to review this judgment is the same as that in *West v. American Telephone & Telegraph Co.*, *supra*.

THE QUESTIONS PRESENTED.

The questions presented are:

(1) In determining the law of Ohio for application under the rule of *Erie R. Co. v. Tompkins*, *supra*, may the Circuit Court of Appeals rely upon an unofficial state court decision which courts within the state are forbidden by Ohio statute to recognize in any way?

(2) In construing the Ohio statute which forbids recognition of cases not officially reported, may the Circuit Court of Appeals ignore the only Ohio decision construing

the prohibition of the statute and rely upon the fact that the Supreme Court of Ohio on various occasions has dealt with such cases upon appeal without apparently being aware of said prohibitory statute?

**REASONS RELIED ON FOR THE
ALLOWANCE OF THIS WRIT.**

The writ of certiorari should be allowed in this case because the Circuit Court of Appeals determined the law of Ohio from an unreported case, upon which the Ohio courts are specifically forbidden by statute to rely.

The result is that the unreported decision states the law of Ohio for the Federal Court but not for the state court. Thus the doctrine of *Erie Railroad Co. v. Tompkins*, instead of unifying the law in the Federal and state courts, in this instance diversifies it.

If the decision of the Circuit Court of Appeals is allowed to stand, the Federal Courts in Ohio will have different rules of Ohio law from those the state courts are permitted to employ. The decision of the Circuit Court of Appeals is clearly erroneous and should be reversed.

M. C. HARRISON,

Attorney for Petitioner.

Dated May 6, 1946.

